92-1060

Supreme Court, U.S.
FILED
SEP 21 1992
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

TIMOTHY GLEN OSTERBROCK,

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Timothy G. Osterbrock
8901 Tripoli Drive
Cincinnati, Ohio 45251
729-5371

30 PP

QUESTIONS PRESENTED

I.

Does not 18 U.S.C. Section 2518(8)(a) pertain to consensual recordings?

II.

Did not the DEA violate 18 U.S.C. Section 2518(7) by not obtaining a court order within 48 hours after the interception of oral and wire communications has ended?

TABLE OF CONTENTS

Petition for Writ of Certiorari to the United States Court of Appeal for the Sixth Circuit

page(s)

Petition for Writ of Certiorari..... 1

Opinions Below..... 3

Jurisdiction 3

Statement of the Case..... 4

Reasons for Granting the Writ..... 6

Conclusion 15

Certificate of Service 17

INDEX TO APPENDICES

Appendix "A": Opinion of the Court of Appeal reported in *United States v. Timothy Glen Osterbrock*, No. 91-3882, July 25, 1992.

Appendix "B": Opinion of the District Court for the Southern District of Ohio.

TABLE OF AUTHORITIES CITED

CASES

page(s)

Berger v. United States
388 U.S. 41, 87 S.Ct. 1873
18 L.Ed.2d. 1040 (1967)..... 8

Katz v. United States
389 U.S. 347 (1967)..... 8

United States v. Giordano
416 U.S. 505, L.Ed.2d..... 8

United States v. Ojeda Rios
495 U.S. -, 109 L.Ed.2d.
110 S.Ct. 1845 (1990) 9, 10, 12, 13, 16

United States v. Osterbrock
91-3882 (1992)..... 3

United States v. Vastola
915 F.2d. 871 (1990)..... 13

STATUTES

UNITED STATES CODE

Title 18, U.S.C. Section 1254(1)..... 3

Title 18, U.S.C. Section 2510 et seq..... 6

Title 18, U.S.C. Section 2511(2)(c)..... 7

Title 18, U.S.C. Section 2517(3) 7,8

Title 18, U.S.C. Section 2518(7)..... 2

Title 18, U.S.C. Section 2518(8)(a)... 2,7,8, 9, 13

Title 18, U.S.C. Section 3231.....4

No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1992

TIMOTHY GLEN OSTERBROCK,
Petitioner

vs.
THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Timothy Glen Osterbrock, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit refusing to suppress the tape recorded

conversations as being in violation of 18 U.S.C. Section 2518(8)(a) and 18 U.S.C. Section 2518(7).

OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported as ***United States v. Osterbrock***, No 91-3882, unpublished opinion (July 25, 1992) and appears in Appendix "A" to this petition. The unpublished written opinion of the District Court for the Southern District of Ohio appears in Appendix "B."

JURISDICTIONAL STATEMENT

The Court of Appeals for the Sixth Circuit Opinion filed their opinion in this matter on June 25, 1992. A Petition for Rehearing was not refiled. The Court of Appeals' opinion is set forth in Appendix "A." The jurisdiction of this Court is envoked under Title 18, U.S.C. Section 1254(1).

STATEMENT OF THE CASE

The United States District Court for the Southern District of Ohio, had jurisdiction in accordance to Title 18 U.S.C. Section 3231.

On November 20, 1987, and again on December 14, 1987, one Galen Steele sold cocaine to an undercover agent, Officer Cox. Steele was arrested after the second sale, and after conferring with counsel, elected to assist the government in the arrest and prosecution of his alleged supplier, whom Steele named as Petitioner, Timothy Glen Osterbrock.

Thereafter, several telephone calls were made to the undercover officers. On December 17, 1987, Steele was "wired" and went to an allegedly pre-arranged location to deliver money to Petitioner. A companion, Boryczka, was with Petitioner at the time and both were arrested. No money or cocaine were recovered from Petitioner at the time of his arrest.

At trial, Steele testified as indicated above, and a plea bargain into which he had entered with the

Government, was admitted into evidence. The taped conversations which had to be sent out to an independent agency to be deciphered - because they were of such poor quality - were admitted into evidence also. These tapes were never sealed in the presence of a neutral judicial authority, nor was there a court order obtained within forty-eight (48) hours after the taping had ceased. The tapes could not be deciphered by the Government, thus they were sent to an independent, outside agency which had no idea of what happened during the recording, except what the Government told them had expired. As the tapes were of such poor quality and the written transcript of the recordings did not represent a true and correct rendition of what transpired, then they should not have been entered into evidence. If the tapes would have been sealed in the presence of a neutral judicial authority and, a court order obtained for their recording of them, the integrity of the tapes would not have been in question.

Petitioner was convicted by jury trial and appealed this decision to the Sixth Circuit Court of Appeals. This appeal was denied.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case to resolve the issue of consenual recordings within the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. Section 2510 et seq., (Title III), which regulates the interception of wire, oral and electronic communications.

Individual Congressmen expressed concern about and criticize the provisions for the unsupervised consensual electronic surveillance contained in 18 U.S.C. Section 2511(2)(c), See, ***S.Rep. No. 1097***, supra, at 175 (remarks of Senator Hart); 114 Cong. Rec. 11598 - 11599, 11470 - 14472, the Senate Committee Report comment to the effect that "[i]t [Section 2511(2)(c)] largely reflects existing law," ***S.Rep. No. 1097***, 90th Cong., 2d. Session, 93-94 (1968),

followed by the citations to On Lee and Lopez, strongly suggests that the provisions represent not intractable approval of these practices but, rather an intention to adopt these holdings and to leave to the courts the task of determining their viability in light of later holdings such as ***Berger*** and ***Katz***.

The primary thrust of 18 U.S.C. Section 2518(8)(a), see S.Rep. No.. 1097, 90th Cong., 2d. Session 105 (1968), and a congressional purpose embodied in Title III in general, see e.g. ***United States v. Giorgano***, 416 U.S. 505, 515 (1974), is to ensure the reliability and integrity of evidence obtained by means of electronic surveillance. The presence or absence of a seal does not in itself establish the integrity of electronic surveillance tapes. Rather, the seal is a means of ensuring that any subsequent opportunity to tamper, alter, or edit the recorded conversations is avoided.

How else can a jury know for certain that the tapes are a correct rendition of what transpired if there is no seal to ensure their integrity?

The Supreme Court in ***United States v. Ojeda Rios***, -----U.S.-, (1990), 109 L.Ed.2d. 224, 110 S.Ct.. 1845, held that tardiness by the government in obtaining sealing of wiretap materials can cost it the use of the materials at trial, just as if the seal was never obtained at all. Section 2518(8)(a) has an exclusionary remedy for noncompliance with the sealing requirement, providing that "[t]he presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral or electronic communication on evidence derived therefrom under subsection (3) of Section 2517." (Ibid.)

The crucial issue then is the fact of <u>no seal</u> having been applied to a series of recordings made by, or under the auspices of the Government, in the case of the Petitioner, Osterbrock. Justice White added,, "It is clear to us that Congress viewed the sealing requirement as important precisely because it limits the Government's opportunity to alter the recordings." (Rios, - U.S. -, 109 L.Ed.2d. at 1847.)

There is also the matter arising from ***Ojeda Rios*** (Id. at 235) which questions whether a district court has an obligation in sealing tapes. Justice White says, "Since it is likely that a district court would automatically seal the tapes, there would be no 'absence' of a seal," his reaction as the Government attempted to interpret Section 2518(8)(a).

Within Section 2518(8)(a) there is nothing which clearly indicates whether district courts have any authority or discretion to deny a governmental request for sealing. The Government in ***Ojeda Rios*** suggested at oral argument that district courts may have such authority but, did not indicate if they did, if they have ever exercised it. (Tr. of Oral Arg. 9) The Respondents countered that under the statute, district courts indeed have a mandatory duty to seal tapes, regardless of the timing of the request. (Id. at 36-37, 47.)

Justice White continued by noting: "Like every Court of Appeals that has considered the question (the sealing of tapes), we conclude that Section 2518(8)(a)

applies to a delay in sealing as well as to a complete failure to seal tapes." (Id. at 235)

In regards to the "satisfactory explanation" of why there was a total absence of a seal, the High Court says that a response "within the meaning of Section 2518(8)(a) cannot merely be a reasonable excuse for the delay presented at the appellate level. Rather, our review of the sufficiency of the Government's explanation for a delay should be based on the evidence presented and submissions made in the District Court. Therein lies the problem in this case. Whether the supervising attorney actually advanced the Government's 'extension' theory in the District Court is not clear. Compare App 4-5 (no sealing required for an on-going investigation until a 'meaningful hiatus occured), and id., at 26-27 (same), with Id., at 36 (separate orders viewed as extensions of an interrelated investigation), and Id. at 40 (same). Thus, even though the misunderstanding now pressed by the Government was objectively reasonable, that explanation is not 'satisfactory' within the meaning of

the statute unless it was relied on at the suppression hearing to explain the sealing delays.

Because the Second did not address this threshold question, the case must be remanded for a determination of whether the Government's explanation to the district court substantially corresponds to the explanation it now advances."" (Id. at 237.)

It is interesting to note that even in dissenting opinions on ***Ojeda Rios***, Justices Stevens, Brennan and Marshall concur that:

"The failure to comply with the sealing requirements of Title III was the unfortunate consequence of a Government lawyer's good faith, but incorrect, understanding of the law. Whether such a mistake should constitute a "satisfactory explanation" for the failure, is as both the district court and the court of appeals recognized, a close question. Both of these courts resolved their doubts in favor of requiring strict compliance with a statute that was carefully drawn to protect extremely sensitive privacy matters. I think their resolution of the issue was correct.

"The ordinary citizen is often charged with presumptive knowledge of laws even when they are complex and confusing. A similar presumption should apply to a federal prosecutor responsible for insuring that a prolonged and extensive program of electronic surveillance is conducted in compliance with the law." (Id. at 237-8.)

With that in mind, let us view what took place in the case of the Petitioner, Mr. Osterbrock:

A series of tapes were made involving the Petitioner Osterbrock and are documented in the original brief filed before this Court. These are listed in the section titled: "Statement of the Case."

There are grevious errors by the Government which even proceed its lack of applying any seal on the items:

1. The Government failed to produce an authentic back-up or duplicate copy of all tapes to ensure their authenticity.

2. The quality of at least one tape was so poor that its contents could not be distinquished, yet it was used for evidence.

3. That tape was removed from the Government's possession and placed within the hands of a stranger to the Court who reportedly "enchanced" the recording and produced a typewritten transcript of the enhanced recording.

4. However, even the enhanced tape was not intelligible, its audible "noise" did not match the transcript, i.e., single vowel words were being compared with double and triple vowel words. Sentence lengths between the audible "noise" and the transcript did not match.

5. The District Court and its prosecutor took no action to seal the tapes or authenticate their integrity throughout the Court proceedings.

Thus, the Government erred by failing to duplicate the original recorded tapes, to sustain the tape's authentically, and it allowed at least one of the tapes to be removed from the Government's possession. A parallel case is before us: ***U.S. v. Vastola*** [915 F.2d 871 (3rd Cir. 1990)] the appellant argued that "all the tapes went to Ginsberg for audio enhancment are subject to suppression." They (appellant) believe that ***Ojeda Rios*** significantly strengthens their position,, as ***Ojeda Rios*** characterized the sealing requirement in 18 U.S.C. Section 2518(8)(a) as a 'means of ensuring that ...the Government has no opportunity to tamper with, alter, or edit the conversations that have been recorded' (110 S.Ct. at 1849). In view of our decision (3rd Cir.) that challenges to the Government's physical treatment of tapes after their unsealing, they should be analyzed in the same manner as sealing delays, appellants conclude that the Government's relinquishment of custody of the tapes

requires their (the tapes) suppression soley because it heightened the risk of tampering."

This case deals with the sealing of tapes, then the unsealing. In this instance we must conclude that the Government's relinguishment of custody of the tapes requires their suppression solely because it heightens the risk of tampering. The Osterbrock tape was returned with a transcript which is not only questionable, but is not substantiated in the official Court (district court) proceedings. Last, the Government failed to secure a seal on the tapes at any point ranging from their recording to their presentation for trial.

Section 2518(8)(a) has an explicit exclusionary remedy for noncompliance with the sealing requirement, providing that "(t)he presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of Section 2517. (Id. at 232)

The Government in its prosecution of Osterbrock, simply ignored any process of sealing the tapes. It never offered an explanation for its lack of a seal. The presence of a seal or a "satisfactory explanation" contained in 18 U.S.C. Section 2518(8)(a) requires that the Government explain not only why a delay occured, but why such a delay is excuseable." (Id. at 229)

As presented in the oral argument in ***Ojeda Rios*** (Id. at 48 Oral Argu.): "If the Government fails to immediately seal the tapes and the courts have pretty uniformly held immediate as within one or two working days of the court, then the Government bears the burden of coming before the district court and establishing a satisfactory explanation."

CONCLUSION

The Petitioner declares that agents violated the Omnibus Crime Control and Safe Streets Act of 1968. Wherefore, the Appelant prays this Honorable Court will

remand this case back to the Sixth Circuit Court of Appeals for vacating the Petitioner's sentence due to the violation of his Constitutional rights.

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA
OCTOBER TERM, 1992

No. _____

TIMOTHY GLEN OSTERBROCK, ***Petitioner***
vs.
THE UNITED STATES OF AMERICA,
Respondent

PROOF OF SERVICE

I, Timothy Glen Osterbrock, do swear or delcare that on this date, November 15, 1992, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached motion on the party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail, properly addressed to each of them with first-class postage prepaid.

The names and addresses of those served are:

1. William E. Hunt, Esq.
   Office of the U.S. Attorney
   100 East Fifth Street
   Suite 220 U.S. Post Office & Courthouse Bldg.
   Cincinnati, Ohio 45202

2. Kenneth W. Starr, Esq.
   Office of the Solitictor General
   U.S. Department of Justice
   Washington, D.C. 20530

/s/ Timothy G. Osterbrock
(Affiant)

Subscribed and Sworn to Before Me
This 15 day of November, 1992.

/s/ John F. Kram Leavenworth, Ks. Appt. Expires: 5-29-94
Notary Public in and for said County and State

APPENDIX "A"

No. 91-3882

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY GLEN OSTERBROCK,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ORDER
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent-Appellee.	)	

BEFORE: KENNEDY and BOGGS, Circuit Judges, and KRUPANSKY, Senior Circuit Juge.

Timothy Glen Osterbrock, a pro se federal prisoner, moves the court under Fed. R. App. P. 40 to reconsider its order of March 24, 1992, affirming a district court judgment denying his motion to vacate his sentence filed under 28 U.S.C. Section 2255.

It appearing that the motion is well taken, the court's order of March 24, 1992, is hereby VACATED. This appeal shall proceed in normal course and will be construed as taken from the district court's judgment of September 12, 1991, denying his motion to vacate under 28 U.S.C. Section 2255.

Entered by Order of the Court

/s/ Leonard Green

No. 91-3882

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY GLEN OSTERBROCK,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ORDER
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent-Appellee.	)	

BEFORE: KENNEDY and BOGGS, Circuit Judges, and KRUPANSKY, Senior Circuit Juge.

Timothy Glen Osterbrock, a pro se Kansas prisoner, appeals a district court order denying his motion to vacate his sentence filed under 28 U.S.C. Section 2255. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In March 1988, a federal jury convicted Osterbrock on one count of conspiracy to possess with intent to distribute cocaine, two counts of distributing cocaine, and one count of using a telephone to facilitate the distribution of concaine. He received a sentence of seventy-two months imprisonment, three years supervised release, and a twenty-five thousand dollar fine. On appeal, Osterbrock argued

that: 1) he was denied his right to counsel when the trial court accepted the jury verdict in the absence of defense counsel; 2) trial counsel rendered ineffective assistance; 3) the government failed to disclose its intent to seek a reduced sentence for the cooperating co-conspirator; and 4) there was insufficient evidence to support the conviction. This court affirmed the conviction. *United States v. Osterbrock,* 891 F.2d 1216 (6th Cir. 1989).

In February 1990, Osterbrock filed his first motion to vacate his sentence under 28 U.S.C. Section 2255. The motion was denied, and Osterbrock did not appeal the denial. On August 28, 1991, Osterbrock filed the present motion to vacate his sentence under 28 U.S.C. Section 2255. Osterbrock alleged that oral communications introduced as evidence during the trial were obtained in violation of 18 U.S.C. Section 2510 et seq. and the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution. The motion was denied. On appeal, he raises the same argument that he presented to the district court. Osterbrock has moved for the appointment of counsel.

Upon review, we conclude that Osterbrock has failed to establish the denial of a substantive right or defect in the trial that is inconsistent with the rudimentary demands of fair procedure. See *United States v. Timmreck,* 441 U.S. 780, 783-84 (1979); *United States v. Ferguson,* 918 F.2d 627, 630 (6th Cir. 1990) (per curiam).

Osterbrock's second motion to vacate constitutes an abuse of the motion procedure afforded under 28 U.S.C.

Section 2255. See Rule 9(b) Rules Governing Section 2255 Procedures; cf. *McCleskey v. Zant,* 111 S.Ct. 1454, 1467 (1991). In addition, a Section 2255 proceeding is not a substitute for a direct appeal. See *United States v. Addonizio,* 442 U.S. 178, 184 (1979). Because Osterbrock did not raise his arugment in his direct appeal, he must show cause for the procedural default and actual prejudice resulting from the errors of which he complains. See *United States v. Frady,* 456 U.S. 152, 167-68 (1982). Osterbrock has failed to satisfy this burden. Nonetheless, we have reviewed Osterbrock's claim and conclude it is without merit. The oral communications which were introduced at trial were not "intercepted" for the purposes of 18 U.S.C. Section 2510 et seq. See *United States v. Meriwether,* 917 F.2d 955, 960 (6th Cir. 1990).

Accordingly, we deny the motion for the appointment of counsel and affirm the district court's judgment. Rules of the Sixth Circuit.

Entered by Order of the Court

/s/ Leonard Green

APPENDIX "B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

TIMOTHY GLEN OSTERBROCK,	)	
	)	
	)	
v.	)	JUDGMENT
	)	IN CIVIL
	)	CASE
UNITED STATES OF AMERICA,	)	
	)	

( ) Jury Verdict. This came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDER AND ADJUDGED THAT the motion to vacate is DENIED. Case is DISMISSED.

Date: August 12, 1992 Clerk: /s/ Kenneth J. Murphy

(By) Deputy Clerk: /s/ Paul Hemming